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DEPARTMENT OF ENERGY

10 CFR Part 1061

RIN 1990-AA50

Procedures for the Issuance of Guidance Documents

AGENCY: Office of General Counsel, Department of Energy.

ACTION: Final rule; delay of effective date.

SUMMARY: This document further delays the effective date of a recently published final rule establishing procedures for the issuance of Department of Energy (DOE) guidance documents.

DATES: The effective date of the rule establishing 10 CFR part 1061 published January 6, 2021, at 86 FR 451, and delayed to March 21, 2021 at 86 FR 7799, February 2, 2021, is further delayed to **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

FOR FURTHER INFORMATION CONTACT: Mr. Matthew Ring, U.S. Department of Energy, Office of the General Counsel, Forrestal Building, GC-33, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586-2555, Email: *Guidance@hq.doe.gov*.

SUPPLEMENTARY INFORMATION: On February 2, 2021, the United States Department of Energy (“DOE”) postponed the effective date of its final rule establishing procedures for the issuance of DOE guidance documents, published in the *Federal Register* on January 6, 2021 (86 FR 451), until March 21, 2021 (86 FR 7799, February 2, 2021). The January 6, 2021, rule implemented Executive Order 13891 (84 FR 55235), which the President revoked on January 20, 2021, in Executive Order 13992 (86 FR 7049). Executive Order 13992 directed the Director of the Office of Management and Budget and the heads of agencies to promptly take steps to rescind any rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing Executive Order 13891, among other Executive orders, as appropriate and consistent with applicable law, including the Administrative Procedure Act, 5 U.S.C. 551 et seq. DOE’s delay of the effective date of its January 6, 2021, guidance rule was necessary to give DOE officials the opportunity to promptly take steps to rescind the rule as directed by Executive Order 13992. DOE also sought comment on any further delay of the effective date, including the impacts of such delay, as well as comment on the legal, factual, or policy issues raised by the rule. DOE received no comments on these issues.

DOE intends to publish a separate notice of proposed rulemaking in the future to withdraw the January 6, 2021, guidance rule. Further delay of the effective date of the guidance rule is necessary to allow DOE to consider comments on the proposed withdrawal and further review its regulations in light of Executive Order 13992 before the rule goes into effect.

Accordingly, DOE delays the effective date of 10 CFR part 1061 to **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

To the extent that 5 U.S.C. 553 applies to this action, it is exempt from notice and comment because it constitutes a rule of procedure under 5 U.S.C. 553(b)(A). Alternatively, DOE's implementation of this action without opportunity for public comment, effective immediately upon publication in the *Federal Register*, is based on the good cause exceptions in 5 U.S.C. 553(b)(B) and 5 U.S.C. 553(d)(3). Pursuant to 5 U.S.C. 553(b)(B), DOE has determined that good cause exists to forego the requirement to provide prior notice and an opportunity for public comment thereon for this rule as such procedures would be impracticable, unnecessary or contrary to the public interest. As an initial matter, DOE provided an opportunity for comment related to the earlier extension of the effective date, and no comments were submitted. Further, DOE has tentatively concluded that, if it goes into effect, the January 6, 2021 final rule will hinder DOE in providing timely guidance in furtherance of DOE's statutory duties. The final rule will in particular hinder DOE's ability to address the economic recovery and climate change challenges enumerated in Executive Order 13992. As discussed in the Executive Order, agencies must have flexibility to timely and effectively address these challenges. The procedures of 10 CFR part 1061 are not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), and they limit the regulatory tools available to DOE to address the challenges listed in Executive Order 13992. Part 1061 deprives DOE of flexibility in determining when and how best to issue guidance based on particular facts and circumstances, and restricts DOE's ability to provide timely guidance on which the public can confidently rely.

In addition, DOE's stated purpose in issuing part 1061 was to promote transparency and public involvement in the development and amendment of DOE guidance documents. DOE notes, however, that its procedures for public transparency and involvement in the development of agency guidance documents will remain unchanged by withdrawal of part 1061. DOE guidance documents will continue to be available on DOE's website. DOE will also continue its

practice, as appropriate, of soliciting stakeholder input on guidance documents of significant stakeholder and public interest. Additionally, stakeholders may still petition DOE at any time to issue, withdraw or revise DOE guidance documents, or inquire about DOE guidance documents, by emailing petitions or inquiries to *Guidance@hq.doe.gov*. The benefits of binding DOE to the procedures of part 1061 therefore appear outweighed by the need for DOE to have the ability to issue guidance timely and effectively to address the challenges listed in the Executive Order, and otherwise to meet its statutory duties. Moreover, DOE notes that guidance, whether issued under part 1061 or otherwise, is non-binding, and does not have the force and effect of law.

As a result, seeking public comment on this delay is unnecessary and contrary to the public interest. For these same reasons DOE finds good cause to waive the 30-day delay in effective date provided for in 5 U.S.C. 553(d).

Signing Authority

This document of the Department of Energy was signed on March 13, 2021, by John T. Lucas, Acting General Counsel, Office of the General Counsel, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the *Federal Register*.

Signed in Washington, DC, on March 15, 2021.

Treena V. Garrett,
Federal Register Liaison Officer,
U.S. Department of Energy.

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